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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOSEPH ALAN DEJAIFRE et al., Plaintiffs and Respondents, v. RICHARD D. WHEARTY, Defendant and Appellant.	B280999 Los Angeles County Super. Ct. No. NC058886

APPEAL from a judgment of the Superior Court of Los Angeles County, Ross Klein, Judge. Affirmed.

Law Office of Stephen A. Madoni and Stephen A. Madoni for Defendant and Appellant.

Builders Law Group and Nick M. Campbell for Plaintiffs and Respondents.

INTRODUCTION

Defendant Richard Whearty appeals from a judgment entered pursuant to a settlement agreement under Code of Civil Procedure section 664.6.[1] He argues the settlement agreement is unenforceable and the trial court erred when it entered judgment on an ex parte application. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Plaintiffs Joseph Alan DeJaifre and Joseph Anthony DeJaifre sued Whearty for breach of contract and other claims related to a March 2011 contract, under which the DeJaifres paid Whearty approximately $95,000 to repair and restore a boat they had recently purchased. The complaint alleged the quality of Whearty's work fell below the standards of the trade, resulting in damages of approximately $75,000.

On June 1, 2015, the parties reached a settlement and orally placed the terms of their agreement on the record before the trial court. In general, the agreement provided for Whearty to perform varnish, blister repair, and painting work on the boat in exchange for dismissal of the suit. The agreement stated in pertinent part:

- "[W]ithin 60 days from when plaintiffs notify Mr. Whearty to proceed, Mr. Whearty will commence repairs . . . ."
- "All materials shall be new and the cost for paint should be solely the responsibility of Mr. Whearty. All costs for labor for this work shall be solely Mr. Whearty's responsibility."

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[1] Statutory references are to the Code of Civil Procedure unless otherwise stated.

- "All work shall be completed within six months from the date that plaintiffs notify Mr. Whearty to proceed with the work . . . ."
- "The parties have agreed the reasonable value of these services and materials is $40,000. In the event that Mr. Whearty fails to perform, plaintiffs are entitled to a judgment in this amount offset by the reasonable value of labor and materials actually provided per the terms of this agreement."
- "In the event Mr. Whearty fails to timely perform any obligation under this agreement, plaintiffs should give notice to Mr. Whearty by and through his counsel of record. Mr. Whearty shall have 14 business days to cure said default after such notice is sent. If Mr. Whearty, after notice, fails to cure such default within that time frame, plaintiffs may seek entry of judgment as provided herein on ex parte notice and application."
- "[T]he parties have agreed that for purposes of proceeding, there will be an inspection of the boat to take place . . . June 5th . . . ."
- "[T]he court [shall] retain jurisdiction subject to Code of Civil Procedure 664.6 to enforce the terms of this settlement and enter judgment, if necessary."

The trial court confirmed with the parties that the terms stated on the record expressed "the totality of the agreement," and that the parties had sufficient time to consult with their attorneys. The court then approved the settlement and dismissed the action, retaining jurisdiction to enforce the agreement under section 664.6.

In mid-May 2016, the DeJaifres contacted Whearty to begin repair work under the settlement agreement. On May 31, 2016,

Whearty's counsel sent a letter to the DeJaifres' attorney objecting to the request. Because nearly a year had passed since the parties entered into the settlement agreement and inspected the boat, Whearty maintained the DeJaifres had "sat on their rights and ha[d] waived the right to the varnish work, blister repair, and paint work set forth in the settlement under the equitable *laches* theory."

On December 14, 2016, the DeJaifres' attorney sent a letter to Whearty's counsel captioned, "Notice of Default." The letter asserted Whearty was in default under the settlement agreement and warned the DeJaifres would make an ex parte application for entry of judgment on January 6, 2017, unless Whearty began the repairs in 14 business days. Whearty did not begin the repair work.

On January 4, 2017, the DeJaifres' attorney wrote to Whearty's counsel to confirm the DeJaifres would apply ex parte for entry of judgment on January 6, 2017.

On January 6, 2017, the DeJaifres filed an ex parte application to enforce the settlement agreement, seeking entry of judgment in the amount of $40,000. Whearty filed opposition papers and requested a continuance of the hearing. The court granted the request, and continued the hearing to January 11, 2017.

On January 11, 2017, Whearty filed a supplemental opposition and supporting declaration. Whearty argued the laches doctrine barred the DeJaifres from enforcing the settlement agreement, due to their delay in requesting the repairs. Alternatively, Whearty argued the court should not enforce the agreement because there was no "meeting of the minds" regarding the DeJaifres' deadline to request the repairs.

On January 11, 2017, after considering the application and opposition papers, the trial court entered judgment for the DeJaifres in the amount of $40,000.

DISCUSSION

1. *The Court Properly Entered Judgment on an Ex Parte Application as Provided in the Settlement Agreement*

First we address Whearty's procedural objection to the judgment. Whearty argues the trial court was not authorized to grant substantive relief under section 664.6 on an ex parte basis. Although the parties' settlement provides for entry of judgment "on ex parte notice and application," Whearty maintains the provision is unenforceable because it violates governing statutory law and his due process rights. The argument has no merit.

Needelman v. DeWolf Realty Co., Inc. (2015) 239 Cal.App.4th 750 (*Needelman*) is instructive. Like Whearty, the appellant in *Needelman* argued a stipulated judgment violated statutory law and his due process rights because it permitted the respondents to "obtain a judgment against him under specific conditions after giving him only 24 hours' notice." (*Id.* at pp. 763-764.) Responding first to the due process challenge, the *Needelman* court explained: " ' "The fundamental requisite of due process of law is the opportunity to be heard." ' . . . [¶] Here, the provision in the stipulation did not deprive [the appellant] of due process. The stipulation required that he be given 24 hours' notice of an ex parte motion for a judgment pursuant to stipulation. [Consistent with the provision], the [respondents] notified [the appellant] orally and in writing of their intent to submit an ex parte application for a judgment pursuant to stipulation . . . . [A]ccording to evidence [the appellant] submitted to the trial court, he did not attend the hearing because he was faced with a choice between appearing in response to the ex parte application or meeting his other work

deadlines; he *chose* to meet his deadlines rather than appear at the hearing. [The appellant] thus had notice and an opportunity to oppose the application; the stipulated judgment did not violate his due process rights." (*Ibid.*)

The *Needelman* court likewise rejected the argument that "section 664.6 requires a noticed motion as opposed to an ex parte motion." (*Needelman, supra,* 239 Cal.App.4th at p. 764.) Characterizing the contention as "misguided," the court explained "[t]he words 'upon motion' " in section 664.6 are properly understood, as in other contexts, to "mean a request of a party." (*Ibid.*, citing *Oppenheimer v. Deutchman* (1955) 132 Cal.App.2d Supp. 875, 879.) Because the respondents "sought judgment as specifically provided for in the settlement agreement," the *Needelman* court held entry of judgment upon ex parte notice was consistent with the governing statute. (*Id.* at p. 764)

Here, the parties' settlement agreement provided that in the event Whearty failed to timely perform any obligation under the agreement, the DeJaifres would give him notice of default and 14 business days to cure. In the event he failed to cure the default, the agreement specifically authorized the DeJaifres to "seek entry of judgment as provided herein on ex parte notice and application."

Whearty does not dispute that the DeJaifres provided notice of default nearly a month before the ex parte hearing, in accordance with the settlement agreement's terms. And, the record shows Whearty received subsequent notice of the ex parte application two days before the hearing, he successfully obtained a five-day extension of the hearing date, and he submitted substantive opposition papers and a supporting declaration opposing the entry of judgment. As in *Needelman*, the record shows Whearty had "notice and an opportunity to oppose the

application; the stipulated judgment did not violate his due process rights." (*Needelman, supra,* 239 Cal.App.4th at p. 764.)

Whearty's statutory arguments are similarly misguided. Like the appellant in *Needelman*, Whearty contends section 664.6's "use of the term 'motion' rather than 'ex parte application' *implies* the notice and hearing requirements" apply to requests for entry of judgment under the statute. And he maintains the DeJaifres' ex parte application violated rule 3.1202(c) of the California Rules of Court, which requires an affirmative factual showing of "irreparable harm, immediate danger, *or any other statutory basis for granting relief ex parte*." (Cal. Rules of Court, rule 3.1202(c), italics added.) While he does not expressly make the connection, Whearty seems to argue section 664.6 cannot serve as a basis for granting ex parte relief under rule 3.1202(c), because the statute refers to a "motion" rather than an ex parte application.

Contrary to Whearty's premise, we agree with *Needelman* that section 664.6's use of the word " 'motion' " is properly understood to "mean a request of a party," and should not be interpreted to limit the terms upon which litigants may stipulate to a settlement of their dispute. (*Needelman, supra,* 239 Cal.App.4th at p. 764.) Because section 664.6 authorizes the court to retain jurisdiction to enforce a settlement agreement according to its terms, the statute serves as a basis for granting ex parte relief where the parties have agreed to entry of judgment upon an ex parte application. Thus, based on the terms of the settlement agreement and section 664.6, the DeJaifres made the requisite showing of a "statutory basis for granting relief ex parte." (Cal. Rules of Court, rule 3.1202(c).) The trial court did not err by entering judgment on the DeJaifres' ex parte application.

2. *The Court Properly Entered Judgment under the Settlement Agreement*

We now turn to Whearty's substantive objections to the settlement agreement and judgment. Whearty contends the trial court should not have enforced the settlement agreement because there had been "no meeting of the minds" regarding a "deadline for completion of the settlement obligations." Alternatively, he argues the court should not have entered judgment under the agreement because the DeJaifres breached an implied obligation to maintain the boat in the same condition it was in at the time of the June 5, 2015 inspection. Neither contention has merit.

Section 664.6 establishes a summary procedure to enforce a settlement agreement by entering judgment under the terms of the settlement. (*Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1182 (*Hines*).) The statute provides, "[i]f parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." (§ 664.6.) And, "[i]f requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (*Ibid.*)

A court ruling on a motion under section 664.6 "must determine whether the parties entered into a valid and binding settlement." (*Hines, supra,* 167 Cal.App.4th at p. 1182.) "A settlement is enforceable under section 664.6 only if the parties agreed to all material settlement terms." (*Ibid.*) " 'A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts.' " (*Sully-Miller Contracting Co. v. Gledson/Cashman Construction, Inc.* (2002) 103 Cal.App.4th 30, 36 (*Sully-Miller*).)

"Under California law, a contract will be enforced if it is sufficiently definite (and this is a question of law) for the court to ascertain the parties' obligations and to determine whether those obligations have been performed or breached." (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 623; *Sully-Miller, supra,* 103 Cal.App.4th at p. 35 ["We review the trial court's ruling on a section 664.6 motion de novo for errors of law."].) "To be enforceable, a promise must be definite enough that a court can determine the scope of the duty[,] and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages." (*Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 770 (*Ladas*).) " 'The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.' " (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 209 (*Bustamante*), quoting Rest.2d Contracts, § 33, subd. (2); accord, *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.) But if "a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract." (*Weddington,* at p. 811.) "Courts seek to interpret contracts in a manner that will render them ' "lawful, operative, definite, reasonable, and capable of being carried into effect" ' without violating the intent of the parties." (*Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 745.)

Whearty acknowledges the express terms of the settlement agreement required him to complete certain work on the boat within 60 days of the DeJaifres' request, without specifying a

deadline for the DeJaifres to make the request.[2] He argues, however, that such a deadline was a necessary, material term of the agreement and that its absence means there was "no meeting of the minds as to the settlement." He maintains the deadline must be regarded as material, because the parties understood the boat's condition would deteriorate over time, thus increasing the work Whearty would need to perform to fulfill his obligations under the settlement agreement.

Whearty is correct that no enforceable agreement could be formed that left his obligations indefinite or subject to expansion at the DeJaifres' complete discretion; however, we disagree with his assertion that a deadline was necessary to make his obligations ascertainable. Critically, the parties expressly agreed as part of their settlement that "the reasonable value of [Whearty's] services and materials is $40,000." And, the agreement provided that, "[i]n the event that Mr. Whearty fails to perform, [the DeJaifres] are entitled to a judgment in *this amount offset by the reasonable value of labor and materials actually provided per the terms of this agreement*." (Italics added.) Thus, even without specifying a deadline for the

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[2] Whearty's discussion of his and his counsel's "understanding that the DeJaifres would be contacting [him] to complete [the work] within a few weeks" of the inspection does not warrant serious consideration. This extrinsic evidence conflicts with the express terms of the settlement agreement, and the trial court reasonably rejected it, resolving the disputed factual issue in favor of the DeJaifres' position that no deadline was intended. (See *Hines, supra,* 167 Cal.App.4th at p. 1182 ["The court ruling on the motion [to enforce a settlement under section 664.6] may consider the parties' declarations and other evidence in deciding what terms the parties agreed to, and the court's factual findings in this regard are reviewed under the substantial evidence standard."].)

DeJaifres to request the work to begin, Whearty's obligations under the settlement were limited to providing $40,000 worth of materials and services, and Whearty had the right to stop performance, without penalty, once the reasonable value of his services reached that amount. Under these provisions, "the limits of [Whearty's] performance [were] sufficiently defined to provide a rational basis for the assessment of damages" (*Ladas, supra,* 19 Cal.App.4th at p. 770), and these provisions afforded the court " 'a basis for determining the existence of a breach and for giving an appropriate remedy.' " (*Bustamante, supra,* 141 Cal.App.4th at p. 209.)

For largely the same reasons, we reject Whearty's contention that the DeJaifres were under an implied obligation to maintain the boat in its condition as of the June 5, 2015 inspection. Whearty argues the inspection was a material term of the agreement, upon which "the parties fully relied . . . to outline what was required by Mr. Whearty to satisfy the terms of the settlement." Thus, he contends the DeJaifres "had a duty to maintain the boat in its current condition as of . . . June 5, 2015 so as not to substantially increase the amount of work that might be required . . . to satisfy [Whearty's] settlement obligations."

Because the agreement expressly limited Whearty's settlement obligations to $40,000 worth of materials and services, the concern that the boat might deteriorate after the inspection is not an adequate basis to imply an obligation to maintain its condition. It is settled that " '[a] covenant will not be implied against express terms or to supply a term on a matter as to which the contract is intentionally silent.' " (*Witt v. Union Oil Co.* (1979) 99 Cal.App.3d 435, 441, quoting 1 Witkin, Summary of Cal. Law (8th ed. 1973) Contracts, § 580, p. 497.) Moreover, to imply an unstated covenant it " 'must be indispensable to effectuate the intention of the parties' " and " 'it must appear

from the language used that [the covenant] was so clearly within the contemplation of the parties that they deemed it unnecessary to express it.' " (*Lippman v. Sears Roebuck & Co*. (1955) 44 Cal.2d 136, 142.)

Here, the parties agreed four days *before* the June 5, 2015 inspection that "the reasonable value of [Whearty's] services and materials [would be] $40,000." Given this sequence, the inspection could not have been intended to serve as a basis for *defining* Whearty's settlement obligations; rather, it could serve only as a means to identify what work Whearty might perform *to meet* those obligations. But, as discussed, regardless of the boat's condition when Whearty's work began, the settlement agreement expressly limited his obligations (and liability) to services and materials reasonably valued at $40,000. There was no basis to imply any additional obligations on the DeJaifres' part. The trial court did not err in finding the parties entered into an enforceable settlement agreement under section 664.6.

3. *Whearty Is Not Entitled to Equitable Relief under the Laches Doctrine*

Apart from his contractual arguments, Whearty contends he is entitled to equitable relief under the laches doctrine because "the DeJaifres sat on their rights." We disagree.

"The basic elements of laches are: (1) an omission to assert a right; (2) a delay in the assertion of the right for some appreciable period; and (3) circumstances which would cause prejudice to an adverse party if assertion of the right is permitted." (*Stafford v. Ballinger* (1962) 199 Cal.App.2d 289, 296.) For the reasons we have discussed, Whearty cannot demonstrate the third element—prejudice. To reiterate, Whearty agreed as part of the settlement that he would provide materials and services worth $40,000, or pay $40,000 to the DeJaifres, offset by the reasonable value of any materials and services he

actually provided. Regardless of the DeJaifres' delay, and the deterioration of the boat that allegedly resulted, Whearty's obligations and liability were always limited to $40,000, whether he chose to perform work on the boat or not.

In view of what he perceived to be the DeJaifres' unwarranted delay, Whearty declined to work on the boat. Given that choice, he was not prejudiced by a judgment requiring him to pay the DeJaifres $40,000 for work he did not perform.

DISPOSITION

The judgment is affirmed. Joseph Alan DeJaifre and Joseph Anthony DeJaifre are entitled to their costs.

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EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J